16-661

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 112.

EDWARD McGINTY, CLAIMANT, &c., PLAINTIFF IN ERROR,

vs.

CHARLES M. FLANNAGAN AND GEORGE M. FLANNAGAN, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF C. M. & G. M. FLANNAGAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED OCTOBER 20, 1879.

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1 UNITED STATES OF AMERICA,
Southern District of Mississippi:

Pleas and proceedings had and done at a regular term of the circuit court of the United States for the southern district of Mississippi, at a regular term thereof, begun and held pursuant to law, at the court-room of said court, in the city of Jackson, in said district, on the first Monday, being the 5th day of May, in the year of our Lord one thousand eight hundred and seventy-nine. Present and presiding, the honorable R. A. Hill, United States judge for Mississippi; present, also, Thos. W. Hunt, marshal for said district, and James M. McKee, clerk of said court.

2 C. M. & G. M. FLANNAGAN
vs.
JNO. J. FITZPATRICK, DEFENDANT; EDWARD McGINTY, claimant.

Be it remembered that heretofore, to wit, on the 5th day of May, A. D. 1879, Edward McGinty, claimant in the above-styled cause, filed in the office of the clerk of the circuit court of the United States for the southern district of Mississippi his (claimant's) affidavit, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally appeared before me, a commissioner of the United States, Edward McGinty, who made oath that the stock of goods, wares,
3 & merchandise, fixtures, drays, and mules levied on February 7th, 1879, by the United States marshal for the southern district of Mississippi, by virtue of an attachment in the case of C. M. & G. M. Flannagan vs. Jno. J. Fitzpatrick, No. 2635, law docket of the United States circuit court, and returnable before said circuit court of the United States May 5th, 1879, for the sum of $15,936.55, are not (except about thirty barrels of old flour branded "Clyde," "Olive," "Glenwood," and "St. James") the property of said Jno. J. Fitzpatrick, but the property of this affiant, and that this claim is not made for fraudulent purposes or delay.

EDWARD McGINTY.

Subscribed & sworn to before me this 10th February, 1879.
[L. S.] LAZ. LINDSEY,
U. S. Com'r.

4 And on the 5th day of May, A. D. 1879, the said Edward McGinty filed his (claimamt's) bond in said cause, in the words & figures following, to wit:

UNITED STATES OF AMERICA:

Circuit court of the United States for southern district of Mississippi.

Know all men by these presents, that we, Edward McGinty, as principal, and John McGinty and P. J. Kennedy and John A. Kline, as sureties, are held and firmly bound unto C. M. & G. M. Flannagan, their executors, administrators, and assigns, in the penal sum of eleven

thousand two hundred , for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators,
5 jointly & severally, firmly by these presents. Signed with our names and sealed with our seals this 14th day of February, A. D. 1879.

The condition of the above obligation is such that whereas an attachment was, upon the 5th day of February, A. D. 1879, sued out in the circuit court of the United States for southern dist. of Mississippi by said C. M. and G. M. Flannagan against one John J. Fitzpatrick, Mississippi, by virtue of which writ the United States marshal for said district has levied upon a stock of goods and merchandise as set forth in the marshal's inventory, the goods being at the time of said levy in the store-house on corner of Crawford & Mulberry streets, which goods, wares, & merchandise have been valued by the marshal at the sum of fifty-six hundred dollars; and whereas the said Edward McGinty has made oath that said goods and property are not the property of
6 said defendant, but are the property of said Edward McGinty, and desires said claim to be tried:

Now, therefore, if the said Edward McGinty shall prosecute his claim to said goods, wares, and merchandise with effect, or, in case he fails therein, shall pay to said C. M. & G. M. Flannagan all such damages as may be awarded against the said Edward McGinty in case his claim shall not be sustained, or shall appear to have been made for fraudulent purpose or delay, and shall well and truly deliver the said goods, wares, and merchandise to the marshal, if the claim thereto shall be determined against said Edward McGinty, then this obligation shall *to* be void; otherwise to remain in full force and virtue.

EDWARD McGINTY. [SEAL.]
JOHN McGINTY. [SEAL.]
J. A. KLINE. [SEAL.]
PATRICK J. KENNEDY, [SEAL.]
By W. B. PITTMAN, [SEAL.]
Att'y in Fact.

7 STATE OF MISSISSIPPI,
Warren County:

Know all men by these presents, that I, P. J. Kennedy, have appointed and do hereby appoint William B. Pittman my attorney in fact, for me and in my name, to execute any and all bonds of replevin and indemnity, as security for Edward McGinty, which it may be deemed necessary or desirable to be executed by said Edward McGinty, in any proceeding in or growing out of the suit of C. M. & G. M. Flannagan, against John J. Fitzpatrick, and especially to execute for me any claimant's bond which said McGinty may desire to make for goods levied on in said suit, hereby ratifying all lawful acts of my said attorney in the premises.

Witness my hand and seal this 7th Feb'y, 1879.

P. J. KENNEDY. [L. S.]

Attest:
A. B. PITTMAN,
D. M. PORTERFIELD.

8 And on the 5th day of May, A. D. 1879, the following tender of issue to the claimant, with claimant's joinder of issue thereon, was filed in said cause, in the words and figures following, to wit:

9 C. M. & G. M. FLANNAGAN
vs.
JOHN J. FITZPATRICK.

In the circuit court of the United States for the sourthern district of Mississippi, to the May term, 1879.

And now come the plaintiffs herein, and say that the property attached herein, at their suit against said Fitzpatrick by the United States marshal, was afterwards claimed and banded by Edward McGinty, as his own property, was and is subject to the said attachment, and they here tender to said Edward McGinty, claimant aforesaid, an issue to try the right of property.

CATCHINGS & INGERSOL,
Plaintiffs' Att'y.

Now comes said Edward McGinty, claimant aforesaid, and joins issue on the issue above tend'ed.

PITTMAN & PITTMAN,
Att'y for Claimant.

10 And afterwards, to wit, on the 30th day of May, A. D. 1879, the following proceedings were had in said cause, and entered of record on the minutes of said court, in the words and figures following, to wit:

11 C. M. & G. M. FLANAGAN
v.
JNO. J. FITZPATRICK, SURVIVING PARTNER, &C.

This day came the plaintiffs in attachment by their attorney, and the claimant Edward McGinty by his attorney, and issue being joined upon the claim of said Edward McGinty to goods, wares, and merchandize and property attached, thereupon came a jury of good and lawful men, to wit, W. S. Lemly, J. M. Gray, Wm. Ruckam, J. C. Rietti, Chas. L. Gaston, Austin Neely, Selden Watkins, E. O. Ryan, Geo. Lennon, Isham R. Dobbins, R.C. Lee, and F. A. Wolfe, who being sworn well and truly to try the issue joined as aforesaid, and the issue being submitted to them, and being charged by the court upon their oaths, say, "We, the jury, find the issue joined in favor of the plaintiffs in attachment, and assess the value of the goods, wares, merchandize, and property attached and falsely claimed by the claimant Edward McGinty,
12 at the sum of fifty-six hundred dollars. It is therefore considered by the court that the said plaintiffs in attachment, have and recover of the claimant Edward McGinty the goods, wares, merchandize, fixtures, drays, and mules levied upon by the marshal on the 7th day of February, A. D. 1879, under and by virtue of the attachment sued out herein by the plaintiffs, if the same can be had, but if not, that the said plaintiffs in attachment then have and recover of the said claimant Edward McGinty and John McGinty, John A. Klein, and Patrick J. Kennedy, sureties on his, claimant's, bond, in this case filed, the said sum of fifty-six hundred dollars, the value of the said goods, wares, merchandize, and property so assessed by the jury as aforesaid, and the costs of this issue to be taxed, for which let execution issue, &c.

13 MEMORANDUM.—Before the jury retired from the bar of the court to consider of their verdict, the claimant tendered his bill

of exceptions to the rulings of the court, which was by the court allowed and signed, and is in the words and figures following, to wit:

14 *Bill of exception of Edward McGinty, claimant.*

In the circuit court of the United States for the southern district of Miss.

C. M. & G. M. FLANNAGAN,
vs
J. J. FITZPATRICK, SURVIVING PARTNER OF Fitzpatrick and Bros., Edward McGinty, claimant.

Be it remembered that this case coming on for trial before a jury on the issue joined on the right of property levied on in plaintiffs' writ of attachment which was claimed by Edward McGinity, the following proceedings were had. The plaintiffs in attachment offered in evidence the following:

The bill of sale made by J. J. Fitzpatrick as surviving partner of Fitzpatrick & Bros. to Edward McGinty on Dec. 20, 1878, conveying to him the stock in trade and sundry accounts set forth in a schedule thereto annexed; the bill of sale and a schedule of certain
15 liabilities assumed by Edward McGinty as part consideration of the purchase annexed to it as part thereof, is in words and figures as follows, to wit: This contract of sale made and entered into this the 20th day of December, A. D. 1878, by and between John J. Fitzpatrick, surviving partner of the firm of Fitzpatrick Bros., a firm lately doing business in the city of Vicksburg, and State of Mississippi, composed of John J. Fitzpatrick and James C. Fitzpatrick, now deceased, party of the first part, and Edward McGinty, late of New Orleans, party of the second part, witnesseth, that the party of the first part for the purpose of paying debts and liabilities of the old firm of Fitzpatrick Bros., has this day bargained, sold, transferred, and set over and delivered to the party of the second part the stock of gro-
16 ceries and merchandise of every character now in the storehouse of the late firm of Fitzpatrick Bros., on the corner of Mulberry and Crawford streets, in the city of Vicksburg, or on storage elsewhere, and also four mules and four drays, and the harness and equipments thereof, and also the store, fixtures, scales, safe, &c., belonging lately to said firm of Fitzpatrick Bros., as per inventory attached, amounting in the aggregate to six thousand six hundred and thirty-three dollars and $\frac{46}{100}$ ($6,633.46), and also certain accounts and debts due the late firm of Fitzpatrick Bros., as the same stands upon the books of said Fitzpatrick Bros., amounting in the aggregate face value to the sum of ten thousand two hundred and twenty-two dollars and $\frac{6}{100}$ ($10,222.6), a schedule of which accounts is hereto attached and made a part hereof. The consideration of this sale is the pay-
17 ment by the party of the second part to the party of the first part the sum of eighty-two hundred dollars ($8,200.00) in cash, which payment has been made and the receipt whereof is hereby acknowledged, and the further consideration of the assumption of the payment of the party of the second part of certain debts and liabilities of the late firm of Fitzpatrick Bros. to certain creditors, a schedule of whose names and amounts due each is hereunto attached and made a part of this contract, amounting in the aggregate to the sum of six

thousand nine hundred and seventy-four dollars and $\frac{16}{100}$ ($6,974.16). And the party of the second part hereby assumes each of the said debts as set forth in said schedule and agrees and contracts to pay the same, and to hold the party of the first and the assets of the
18 firm of Fitzpatrick Bros., not herein transferred, harmless as to the debts by him assumed and set forth in said schedule. In testimony whereof the parties place their hands and seals this the 20th day of December, A. D. 1878.

J. J. FITZPATRICK,
Surviving partner of Fitzpatrick Bros.
EDWARD McGINTY.

Witness:
W. B. PITTMAN.

19 *Schedule of liabilities of J. J. Fitzpatrick, surviving partner of Fitzpatrick Brothers, assumed by Edward McGinty, in the contract annexed.*

N. Scheffer	past due			127 50
Dozier, Weyl & Co	do			184 99
Rosskam, Gestley & Co	do			207 85
Cornwall & Bros	do			72 15
J. B. Ferguson, note due Jan'y 8, '79				250 00
R. V. Powers, account				1,479 29
C. M. and G. M. Flannagan, acceptance	Dec. 24, '78.			479 56
Do	do	do	do 26	217 44
Do	do	do	Jan 1, '79	368 13
Do	do	do	" 23d	93 00
Schmidt & Zeigler	do	Dec. 26, '78		192 37
Do	do	do	Jan. 2, '79	344 65
Do	do	do	" 26	112 54
W. H. Smith	do	Dec. 28, '78		41 36
S. W. Venable & Co	do	" 30, "		214 07
Rossham, Gestley & Co	do	Jan. 3, '79		203 50
Wood & Lee	do	" 6, "		292 09
Do	do	Mch. 7, "		292 09
Kerbs & Speirs	do	Jan. 28, "		241 20
Dausman & Dausman	do	" 13, "		174 05
20 Do	do	do	Feb. 1, "	94 55
Dozier, Weyl & Co	do	" 8, "		99 75
H. C. Cole & Co., account	Jan			176 75
John Y. Haas & Co., account	due	Jan, 4, '79		207 00
W. H. Smith, acceptance	"	" 9, "		40 56
Jarrett & Co	do	" 12, "		75 60
Geo. Fox Starch Co.	do	" 28, "		64 57
Eagle Lye Co	do	" 31, "		65 00
R. B. Pace & Co., a/c	at call			109 02
Mrs. M. E. Kendall,	" " "			11 03
Str. Fair Play	" " "			22 88
Halliday & Phillips	" " "			41 58
J. A. Quackenboss,	" " "			27 14
Jno. G. Poindexter,	" " "			75 58
Jno. P. Little, rec'r,	" " "			195 00
L. T. Basket & Co.	" " "			6 29
Haines & Idelet	" " "			34 04
Thos. Jones & Co.,	" " "			50 00
Total				$6,974 16

of exceptions to the rulings of the court, which was by the court allowed and signed, and is in the words and figures following, to wit:

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In the circuit court of the United States for the southern district of Miss.

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15 liabilities assumed by Edward McGinty as part consideration of the purchase annexed to it as part thereof, is in words and figures as follows, to wit: This contract of sale made and entered into this the 20th day of December, A. D. 1878, by and between John J. Fitzpatrick, surviving partner of the firm of Fitzpatrick Bros., a firm lately doing business in the city of Vicksburg, and State of Mississippi, composed of John J. Fitzpatrick and James C. Fitzpatrick, now deceased, party of the first part, and Edward McGinty, late of New Orleans, party of the second part, witnesseth, that the party of the first part for the purpose of paying debts and liabilities of the old firm of Fitzpatrick Bros., has this day bargained, sold, transferred, and set over and delivered to the party of the second part the stock of gro-
16 ceries and merchandise of every character now in the storehouse of the late firm of Fitzpatrick Bros., on the corner of Mulberry and Crawford streets, in the city of Vicksburg, or on storage elsewhere, and also four mules and four drays, and the harness and equipments thereof, and also the store, fixtures, scales, safe, &c., belonging lately to said firm of Fitzpatrick Bros., as per inventory attached, amounting in the aggregate to six thousand six hundred and thirty-three dollars and $\frac{46}{100}$ ($6,633.46), and also certain accounts and debts due the late firm of Fitzpatrick Bros., as the same stands upon the books of said Fitzpatrick Bros., amounting in the aggregate face value to the sum of ten thousand two hundred and twenty-two dollars and $\frac{6}{100}$ ($10,222.6), a schedule of which accounts is hereto attached and made a part hereof. The consideration of this sale is the pay-
17 ment by the party of the second part to the party of the first part the sum of eighty-two hundred dollars ($8,200.00) in cash, which payment has been made and the receipt whereof is hereby acknowledged, and the further consideration of the assumption of the payment of the party of the second part of certain debts and liabilities of the late firm of Fitzpatrick Bros. to certain creditors, a schedule of whose names and amounts due each is hereunto attached and made a part of this contract, amounting in the aggregate to the sum of six

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18 firm of Fitzpatrick Bros., not herein transferred, harmless as to the debts by him assumed and set forth in said schedule. In testimony whereof the parties place their hands and seals this the 20th day of December, A. D. 1878.

J. J. FITZPATRICK,
Surviving partner of Fitzpatrick Bros.
EDWARD McGINTY.

Witness:
W. B. PITTMAN.

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W. H. Smith, acceptance	"	"	9, "	40 56
Jarrett & Co	do	"	12, "	75 60
Geo. Fox Starch Co.	do	"	28, "	64 57
Eagle Lye Co	do	"	31, "	65 00
R. B. Pace & Co., a/c	at call			109 02
Mrs. M. E. Kendall,	"	"	"	11 03
Str. Fair Play	"	"	"	22 88
Halliday & Phillips	"	"	"	41 58
J. A. Quackenboss,	"	"	"	27 14
Jno. G. Poindexter,	"	"	"	75 58
Jno. P. Little, rec'r,	"	"	"	195 00
L. T. Basket & Co.	"	"	"	6 29
Haines & Idelet	"	"	"	34 04
Thos. Jones & Co.,	"	"	"	50 00
Total				$6,974 16

And the plaintiff then offered in evidence the contract of employment made between J. J. Fitzpatrick and Edward McGinty, in words & figures as follows, to wit:

21 *Articles of agreement made and entered into by and between Edward McGinty and John J. Fitzpatrick.*

The said Edward McGinty having purchased the stock of goods which belonged to the late firm of Fitzpatrick Brothers is to carry on the business of wholesale and retail grocers in the city of Vicksburg under the name and style of "Fitzpatrick and McGinty," and is to be the sole owner of said business, and the stock in trade now on hand and which may hereafter be acquired. The said John J. Fitzpatrick is to attend diligently to said business, giving his time, service, and influence to the interest of said business, and to allow the use of his name in the name and style under which said business is to be conducted for an annual salary of twenty-five hundred dollars,
22 which may be drawn by said Fitzpatrick in monthly instalments. Said Fitzpatrick shall have no other interest in the said business or stock in trade. This contract shall remain in force for at least one year unless terminated by mutual consent, and with that limitation the business association hereby formed may be dissolved and terminated by either of said parties after the expiration of one year by giving notice in writing of his purpose six months before said dissolution.

In witness whereof the said parties have hereunto set their hands and seals this 20th day of December, A. D. 1878.

EDWARD McGINTY. [L. S.]
J. J. FITZPATRICK. [L. S.]

Witness,
ALF. B. PITTMAN.

23 The plaintiff also offered evidence tending to show the following facts preceding and attending the sale. That the late firm of Fitzpatrick Bros., of which J. J. Fitzpatrick is sole surviving partner, was dissolved by the death of J. C. Fitzpatrick on Sept. 6, 1878.

That the available and convertible assets were not sufficient to enable the surviving partner to meet liabilities as they matured, and have since proven insufficient, & that the late firm was insolvent.

That among the liabilities of the late firm were the claims of the plaintiffs for which they obtained judgment against the surviving partner in this attachment suit which judgment was offered in evidence.

That among said liabilities were debts due to the Mississippi
24 Valley Bank amounting to about $6,000.00 & to John McGinty, who resides in New Orleans, La., one note of $52,000 and one of $2,500. That at the time of the death of J. C. Fitzpatrick John J. Fitzpatrick was detained at home by sickness of yellow fever in his family, having himself recovered from the same disease almost the latter part of Sept.

That the said J. J. Fitzpatrick had an inventory taken on Oct. 1, of goods in stock; that for the purpose of replenishing stock about $200 worth of goods had been brought & put in the store.

That the surviving partner continued to buy and sell, having bought between the death of his partner and the day of sale to the claimant over $12,000 worth of goods, many of them from plaintiffs.

That on or about Dec. 3d, 1878, the said surviving partner be-
25 ing in great need of money to pay some debts of the late firm,

borrowed $5,700 from the said John McGinty, with the statement that he urgently needed the money to pay some firm debts, and that he would so use it, and in a few days, as soon as he could realize from the assets, he would repay it. For this money he gave his note to John McGinty, payable one day after date, and applied the money to the payment of debts of the late firm.

That on the 20th day Dec. he made the sale to Edward McGinty, and on the same day paid John McGinty the $5,700 borrowed on Dec. 3—& also $2,500—note of Fitzpatrick Bros., leaving unpaid the $5,200 note. There was evidence tending to show that the sale was made for the purpose of converting the assets into money to enable J. J.
26 Fitzpatrick to make the payments to John McGinty, in preference to other creditors, and that Edward McGinty understood the object and purpose of the sale. The evidence claimed to have this tendency was evidence showing that Edward McGinty was a distant relative of John McGinty, who had lately come to the house of the latter from Michigan, in pursuance of an invitation extended to him in answer to a letter from Edward McGinty asking John McGinty to look out for *im*ployment for him.

The fact that John McGinty had told him that the firm of Fitzpatrick Bros. owed him money, & that he, John McGinty, might have to take an interest in the house to secure payment; that John McGinty having declined to take an interest or to buy the stock and assets himself, on account of apprehension that it might not be legal because he was a creditor, suggested to Edward McGinty to buy, furnished him
27 the money for that purpose, went with him to Vicksburg, and assisted in effecting the sale and received the money for the two notes, amounting to $8,200, at the hands of Edward McGinty, by whom the money had been sent by Fitzpatrick, the latter being then engaged. Edward McGinty took the money from Fitzpatrick, being the same which he had paid to him and carried it down to the hotel & paid it to John McGinty, & rec'd from him the notes, and gave them up to Fitzpatrick.

John McGinty took the note of Ed. McGinty for the money so loaned, and this note remains unpaid. In addition to this, said John McGinty testified that he had not concealed from Edward McGinty his object in procuring the purchase, & thinks he must have understood it, tho' he did not talk much with him about it and did not state to him
28 any of the particulars. Edward McGinty had arrived from Michigan on the 11th of Dec., 1878.

EDWARD MCGINTY, called by plaintiff, said he understood, from what John McGinty had told him, & from circumstances, that the object of the sale on the part of J. J. Fitzpatrick, was to get the means of paying John McGinty, but knew nothing of the particulars of the debt.

Plaintiff offered a copy of Vicksburg Herald of the 24 day of Dec., containing the following advertisement:

Notice.

The late firm of Fitzpatrick Brothers having been dissolved by the death of James C. Fitzpatrick, the undersigned, surviving partner, will attend to the liquidation of the affairs of the late firm, and will
29 be found at the old stand now occupied by Fitzpatrick & McGinty.

J. J. FITZPATRICK,
Surviving Partner.

VICKSBURG, *Dec.* 20, 1878.

Notice of partnership.

The undersigned have this day formed a partnership, under the firm style of Fitzpatrick & McGinty, and will continue the business of wholesale grocers, cotton factors, and commission merchants at the old stand of Fitzpatrick Brothers. By close attention to all matters entrusted to them, they hope for a continuance of the patronage heretofore extended to the firm they succeed.

J. J. FITZPATRICK.
EDWARD McGINTY.

VICKSBURG, *Dec.* 20, 1878.

30 Pl'ff also offered a copy or of the Vicksburg Herald of the 16th day of Feb., containing the following:

Notice.

Our friends and customers are notified that the recent closing of our store was on attachments sued out to collect debts due by Forbes & Fitzpatrick and Fitzpatrick Bros., with which the present firm had no connection. The levy of this attachment upon our stock of goods, we are advised, was illegal & unjustifiable. The goods have been bonded and released, and the business will be continued as heretofore by Edward McGinty, who is and has always been the sole owner of the goods and assets of the firm of Fitzpatrick & McGinty, under the firm name and style of Fitzpatrick & McGinty.

VICKSBURG, *Feb.* 15, 1879.

31 It was in evidence that the debts assumed by Edward McGinty as being payable to C. M. & G. M. Flannagan, described on the schedule as acceptances, refer to the plaintiffs, and were paid by Edward McGinty at respective maturities.

There was evidence tending to show that the sale to Edward McGinty & its terms were known to plaintiffs before their attachment was sued out; and there was evidence to the contrary, G. M. Flannagan, testifying in his own behalf, stating that he had no such information until the day or the day after the writ of attachment was levied. J. J. Fitzpatrick testified that he expected, when he made the sale, that he would be retained on some terms in the house; that there was no agreement or understanding whatever to that effect, but that he expected it because he believed his services would be more valuable than that of any one esle.

32 Edward McGinty, being asked by plaintiffs, testified that when he bought the goods he expected to employ Mr. Fitzpatrick, though the matter was not mentioned or spoken of between them.

John McGinty, being asked by plaintiffs, said that it was his expectation that Mr. Fitzpatrick would be retained; that he had himself intended to do so if he had bought the goods, but he does not know what was the expectation of the others.

It was shown that the goods were sold at original cost price, with ten per centum added for cost of carriage, and that of the accounts transferred a larger part of them have been found uncollectable, and still remain uncollected, than was supposed would be the case.

Mr. J. J. Fitzpatrick testified that the price paid and agreed to be paid by Edward McGinty was more than the real value of the assets, as they have since turned out.

33 There was evidence tending to show that there had been no misapplication of the assets of the partnership, unless the payments made by the sale constituted a misapplication; and there was evidence tending to show that the debts of the copartnership which had been paid equalled the net assets converted or disposed of by the surviving partner.

G. M. FLANNAGAN, being introduced as a witness in his own behalf, testifies, among other things, that after his arrival in Vicksburg, in January, 1879, after a good many consultations with J. J. Fitzpatrick, the latter invited me to his residence, saying, "I will have Edward McGinty to meet us, as he is as much interested as I am."

(Defendant objected to the admission of this conversation, and being admitted against his objection, excepted.)

Witness proceeded: After consultation with both of them at
34 the residence, that night, they both said, "We will hand you a proposition in a day or two."

(Which was admitted against defendant's objection, & he then & there excepted.)

Witness proceeded: Afterwards a memorandum of a proposition was handed to me at my request, which was lost, & a copy of which was afterwards given me by defendant, written by J. J. Fitzpatrick & delivered by Edward McGinty, which I now exhibit.

(This memorandum of proposition was admitted against the objection of defendant, and exception thereto reserved, as irrelevant & incompetent.)

Said memorandum is in words and figures as follows:

The proposition submitted to you last week, and which was rejected by you, was as follows:

"C. M. & G. M. Flannagan to surrender to J. J. F. (J. J. Fitz-
35 patrick) the $6,000 note of Forbes & Fitzpatrick, and to take up from E. A. Forbes the $1,000.00 of F. Bros.' (Fitzpatrick & Bros.) paper held by him, & which he expressed his willingness to surrender on being released on above note, and to surrender this $1,000 of paper to J. J. F. (J. J. Fitzpatrick), in addition to the note of F. & F. (Forbes & Fitzpatrick), for which $7,000.00 of past-due paper J. J. F. (J. J. Fitzpatrick) would transfer to C. M. & G. M. F. (C. M. & G. M. Flannagan) accounts due Forbes and F. (Forbes & Fitzpatrick), and by them transferred to F. Bros. (Fitzpatrick Bros.), amounting in the aggregate to $10,000 00, or as near as possible not to be less in amount. For the past-due paper of F. Bros. held by C. M. & G. M. F., the latter to give credit by a/c against D. J. Donovan of $2,334.06, and for
36 the balance of said paper to accept drafts of J. J. F. on and accepted by F. & McG. (Fitzpatrick & McGinty), in equal amounts, at 15, 18, 21, 24, 27, 30, 33, & 36 months from date, and to surrender to J. J. F. the past-due paper of F. Bros."

Plaintiff then offered the letter of J. J. Fitzpatrick, bearing dated Dec. 20, written to plaintiffs, which was admitted against defendant's objection, & defendant excepted thereto.

Said letter is as follows:

[Office of Fitzpatrick Brothers, wholesale grocers and cotton factors, cor. Crawford & Mulberry streets.]

VICKSBURG, MISS., *Dec. 20th*, 1878.

C. M. AND G. M. FLANNAGAN, *St. Louis:*

DEAR SIR: When I wrote you that Mr. Forbes and myself would

work together, having only the details to agree on, I did not
37 contemplate the shape in which he would wish to place those details. I proposed to him, after I had obtained the use of $5,700.00, to get out of the power of the bank people; that he should bring in as his cash capital an amount equal to the then credit to my a/c; that the new firm take the stock & assets of F. Bros., & assuming the liabilities of the firm, go to work under the style of Fitzpatrick and Forbes, but later made the proposition over with the change in style to Forbes & F. When I first submitted my proposition to him I recalled to his memory that as he had sold certain open a/c at their face value, per the books, & in addition to the actual figures of his entire interest in the firm of Forbes & F. had received very nearly $4,000.00 over same; that he ought to be willing to receive back as I pro-
38 posed a half interest in the same a/cs. He would not agree to my proposition, & then submitted his, as follows: The new firm to be known as E. A. Forbes & Co.; they to assume the liabilities of F. Bros., and as against such to take the stock and such of the a/cs due as might be agreed on, which in amount when added to the value of the stock would be equal to the amount of liabilities assumed and having on my hands, as surviving partner, to liquidate the balance of F. Bros. affairs, the $5,700 I obtained on the 3rd inst. to meet the bank claim not being down as a liability to be assumed. The actual result of his proposition if carried would have been to leave me without one single cent of interest in the new firm unless I should again call on my friends and obtain additional loans of money to equal the
39 amount he might have to put in some $6,000 or 7,000, as he said. I could not agree to such a proposition and further involve those who had served me so faithfully. I was bound by every principle of honesty and fair dealing to at least secure the $5,700 I put in on the 4th inst. After we had split in this, Mr. John McGinty came up to see me, and I made him a full statement & exhibit, and he said that he never would consent to my accepting the proposition of Mr. Forbes. Then while he was here I again tendered the proposition to Forbes, as at first, with the firm style as Forbes & F. He said he would take it into consideration; but I have not been able to get any answer from him. Seeing no probability of being able to do anything with him, I have done that which, on mature reflection and the advice of my
40 friends, affords me the best and only visible hope of ever working out of debt. In the partnership between Mr. Edward McGinty and myself your invoice paper to mature for purchases since the death of my brother is provided for, & will be met as it matures. I inclose you an a/c against D. J. Donovan, of Edwards, $2,334.06, against which he placed his $5,000 note as collateral, and which with his knowledge has been placed in your hands by Fitzpatrick Bros. to secure to you the payment of his a/c. We credit his account on books of F. Bros., & charge your special a/c with same, thus giving you the right, as was due you, & you only, to collect the amount from him. If you so desire, & we or I can aid you in any way in making the collection, let me know and I am at your service. As soon as I can get off a complete exhibit of F. Bros.' affairs I will see you. If neither of you
41 contemplate coming down, I will go up, but cannot get off until after Christmas. Please let me know by telegram if either of you expect to come down, or shall I come up to see you? In the matter of future purchases I feel that it is due you to offer what trade we can give you, if agreeable to you to fill our orders, but prefer to draw out articles we need until I hear from you. You may rely on payments

being met for all we will order. Please let me hear from you by telegram on receipt as to seeing you there & filling orders.

Yours, truly,

J. J. FITZPATRICK.

The foregoing contains a full statement of all the evidence, or the tendency of all the evidence, before the jury.

Thereupon the defendant handed to the presiding judge the following instructions, which he asked should be given to the jury
42 in his behalf, to wit:

1st. If the jury believe that Edward McGinty, the claimant, purchased the goods levied on from J. J. Fitzpatrick, as surviving partner of Fitzpatrick & Bros., in good faith, they must find for the claimant.

2nd. And the purchase would not be fraudulent merely because the sale was made to convert the assets into money for the purpose of paying John McGinty a debt for money loaned by him to the surviving partner to be used and which was used in paying partnership debts, although said Fitzpatrick, as such surviving partner, was insolvent at the time, and although Edward McGinty had full knowledge of all the facts and the purposes of the parties.

43 3. If the jury believe that J. J. Fitzpatrick, as surviving partner, bought goods on a credit to replenish the stock which was on hand at the death of his partner, and continued to buy and sell as surviving partner, and as such surviving partner borrowed money and used the same in payment of partnership debts, and continued and carried on the business of the late firm in good faith, and then sold the stock in trade and other assets for a full, fair value, and applied the proceeds to the payment of cerain preferred creditors, some of whom were creditors of the late partnership, and others of whom were creditors for goods sold since the death of the late partner, such sale will be valid, although the purchaser knew the facts and understood that the sale was made for the purpose of making such application of the money.

44 4. If J. J. Fitzpatrick, as surviving partner, continued and carried on the business of the late firm of Fitzpatrick & Bros., adding to the stock, mingling the new with the old goods, creating debts for the goods so purchased, as surviving partner in good faith, the new creditors may be paid out of the assets of the entire business, and any sale or assignment of the goods, though consisting of the old and new commingled, will not be avoided because the proceeds were paid with the knowledge of the purchaser to creditors, old & new, indiscriminately, although some of the partnership creditors may remain unpaid and unprovided for.

5. If a surviving partner carries on the business of the late copartnership without authority, and the goods purchased by him since the dissolution of the partnership are claimed as partnership
45 property, and the surviving partner is held to account for the entire business as partnership business, then all debts contracted by him in good faith for the benefit of such business are to be treated as partnership debts, or as of equal dignity & equity with partnership debts.

6th. The jury are instructed that if the plaintiffs accepted from Edward McGinty the payment or payments assumed by him as part of the price for his purchase, and knew at the time of accepting said payments the consideration upon which it was made, then plaintiffs are estopped, and the jury must find for the claimant.

7th. If the jury find that Edward McGinty has made any payment to the plaintiffs in pursuance of his assumption as part consideration of the purchase of the goods levied on, and if plaintiffs, having re-
46 ceived said payment without being at the time apprised of the consideration thereof, have nevertheless retained it since they have acquired such knowledge without having offered to return the money so paid to them, they will be estopped, and the jury must find for the claimant.

8th. If the jury believe the evidence, they must find for the claimant.

9th. If the jury believe that the price paid by Edward McGinty was the full value of the property at the time, and the purchase-money was intended by both Edward McGinty and Fitzpatrick to be applied to the payment of John McGinty's debt, and of the other debts assumed paid by Edward McGintry, there can be no inference that such sale was intended to defraud the creditors whose debts were no pro-
47 vided for by sale, although such sale necessarily resulted in giving the creditors whose debts were thus provided for a preference, to the exclusion of creditors not so provided for.

10th. Although the jury may believe from the evidence that Fitzpatrick was influenced in making this sale by a well founded expectation of future employment from the purchaser, this cannot render the sale void if it was made for a full and fair price.

11th. Even if the jury should infer that John McGinty had an understanding with Fitzpatrick that the latter would be employed after a sale made for the purpose of paying John McGinty's debts, & that John McGinty, in pursuance of that understanding, requested Edward McGinty to employ Fitzpatrick, they cannot hold the sale void on this account if it was made for a full and fair price.

48 Each and every of said instructions so asked were refused by the court in the form in which they were asked, and defendant, by his counsel, then and there excepted to the refusal to give to each and every of said instructions separately for the refusal of each. His honor proceeding to instruct the jury sua sponte, defendant's counsel objected to the courts giving any instructions which had not been asked in writing, in pursuance of the statute of Miss. in such cases provided, but the objection was overruled and defendant excepted, and the court proceeded to charge the jury as follows:

1st. If the jury believe from the evidence that J. J. Fitzpatrick sold the goods of the late firm of Fitzpatrick and Bros. and applied the proceeds to the payment of some of the creditors of said firm to the exclusion of others, he had a right to do so, provided it was not
49 done with the purpose of delaying and preventing those not paid for collecting that which was due them.

2. It was the duty of J. J. Fitzpatrick, as such surviving partner, to sell and convert into money the goods and property belonging to said firm, and to collect the debts due the firm, and first apply the same to the payment of the debts due by the firm, and not to mingle the same with his own goods, so that they could not be identified, he being by law created a trustee for this purpose; but if he mingled them with other goods, so that they could not be identified, he thereby rendered his own goods liable for the debts of the firm, or those originally owned by the firm; and if he applied the proceeds of the sale of such goods, either originally owned by the firm or those afterwards purchased
50 and mixed up with them so that they could not be identified, to the payment of his private debts, such disposition operated as a fraud upon the rights of the creditors of the firm of which he was surviving partner and as to him rendered the sale void.

The death of J. C. Fitzpatrick terminated the partnership of Fitzpatrick & Bros. The continuance of the business after that time, though in the name of Fitzpatrick & Bros., was his own business. If, after the death of J. C. Fitzpatrick, J. J. Fitzpatrick borrowed money and applied it to the payment of the debts of Fitzpatrick & Bros. it was paying a debt for which was bound, and he could not withdraw any portion of the firm assets until after the partnership debts are paid.

3. If the evidence satisfies you that the sale of the goods held by J. J. Fitzpatrick as aforesaid was made for the purpose of the mis-
51 application of the proceeds, as above stated, and McGinty, the claimant, purchased in good faith, without the knowledge of such wrongful purpose, he nevertheless acquired a good title to the goods, and your verdict should be for him.

4. If you believe from the evidence that at the time of the purchase McGinty, the purchaser, knew or had reasonable cause to believe that the goods so purchased belonged to the late firm of Fitzpatrick & Bros., and that the sale was made to pay a debt due by J. J. Fitzpatrick alone, he became chargable with the fraud of Fitzpatrick, his bargainer, and your verdict should be for the plaintiff.

5. If you believe from the evidence that Fitzpatrick, in making the sale, intended to become a partner with McGinty, and derive a benefit thereby, and by so doing to place the stock of merchandise sold
52 beyond the reach of the creditors of Fitzpatrick & Bros., it was a fraud upon the rights of the creditors of said firm; and if the proof further shows that McGinty, the purchaser, had a knowledge of such purpose, or had reasonable cause to so believe he would be effected by the fraud, and your verdict should be for the plaintiff; but if no such understanding was had at the time, but an arrangement for the partnership was afterwards, and the contract was otherwise valid, then such arrangement would be valid; or if there is not sufficient evidence that McGinty, the claimant, knew, or had reasonable cause to believe, that such arrangement was made with the wrongful purpose aforesaid, although it existed in the mind of Fitzpatrick, he was not affected thereby, and your verdict should be for the claimant.

6. Fraud must be proved, but is seldom established by direct
53 proof, but like any other fact may be established by circumstantial evidence. The burthen of proof is upon the plaintiff to establish by proof to your reasonable satisfaction the fraud charged. You are the sole judges of the weight to be given to the evidence, and will, first considering all the circumstances as shown by the evidence, and first ascertain whether the sale was fraudulent under the rules of law stated, and if you find it is not so established you will return your verdict for the plaintiff; but if you find the sale fraudulent so far as made upon the part of Fitzpatrick, your next enquiry will be to ascertain whether or not, under the rules stated, McGinty knew, or had reasonable cause to believe, that the sale was fraudulent; if it is found that he had no such knowledge, or reasonable cause to believe the sale fraudulent, your verdict will still be for the complainant;
54 but if you find that he did know, or had reasonable cause to believe, the sale on the part of Fitzpatrick, under the rules stated your verdict will be for the plaintiff.

7. If the proof shows that the plaintiffs, with a full knowledge of all the facts, approved the sale they will be estopped from setting up the fraud, and if the proof shows that with such knowledge they received a part of the property conveyed or its proceeds will be evidence of such approval.

8th. If the jury believe that it was understood between the parties when the contract was made that the conveyance was made Edward McGinty to prevent the same from liability to the creditors of Fitzpatrick, and that J. J. Fitzpatrick was to receive a benefit from the transaction in the form of a salary or otherwise, the contract was fraudulent and void.

55 9. If the proof shows that Edward McGinty was not, in fact, the purchaser of the goods, but that John McGinty was the real party, and that name of Edward McGinty was for the benefit of J. J. Fitzpatrick or John McGinty, the contract was fraudulent and void.

The defendant, by his counsel, immediately objected and excepted to the charge as given in the following particulars: He objected & excepted to the charge numbered—

1. First. Because it was abstract and misleading.

He objected and excepted to the—

2nd charge or proposition because it was erroneous in law, and, under the facts, tended to mislead in some one or all of the following particulars: It was erroneous and misleading, under the facts of this case, to state that if the surviving partner had bought other goods and

56 mingled them with the goods on hand owned by the late firm, and then paid any of his private debts out of the proceeds of the goods, either originally owned or subsequently bought, it operated as a fraud on firm creditors.

And because it was erroneous & misleading to speak of debts owed by the surviving partner for the very goods put in stock as private debts in the connection in which it is there used.

And because it was erroneous and misleading to charge under the facts of this case & in the connection in which it was said to state that "If, after the death of J. C. Fitzpatrick, J. J. Fitzpatrick borrowed money and applied it to the payment of the debts of Fitzpatrick Bros. it was paying a debt for which he was liable, & he could not withdraw any portion of the firm assets until after the partnership debts are paid."

57 He objected and excepted to the 3rd charge because its tendency is to instruct the jury that if the purchaser did have notice of what is there called "such unlawful purpose" it would avoid the sale, and it assumes that such payments as are therein referred to would be a misapplication of the proceeds, & that a purpose to make such payments is an unlawful purpose.

He objected and excepted to the 4th charge because, under the facts of the case, its tendency was to mislead and to further impress the jury with the idea that to pay debts contracted after dissolution of partnership with the proceeds of the goods bought after that time was fraudulent, and that a sale with such intent would be void if the purchaser had reasonable cause to believe that it was made with such purpose.

58 He objected and excepted to the 5th charge, as abstract, misleading, and inconsistent.

He objected and excepted to the 6th, because it was abstract and tended to mislead, because abstract in part and erroneous in its proportions.

He objected and excepted to the 7th charge, as being insufficient on the point embraced & because of its substantial failure to direct the jury as requested by defendant, that an acceptance of the payments referred to under the circumstances stated would itself be a waiver, and would estop plaintiff from recovery against claimant, instead of saying

as the charge does, that it is evidence of approval. And because of its failure to instruct the jury that a retention of money paid by McGinty to them as part of the purchase-money of the goods, after
59 knowledge thereof, would prevent recovery against claimant, and because said charge fails to instruct the jury as requested, that a retention of the money so received, after knowledge of the facts, without offering to return it, would estop plaintiff herein.

He objected and excepted to 8th charge, because abstract and because erroneous in law.

He objected to the 9th instruction, because it is abstract, and, in so far as it states that if John McGinty was the real party, & that if the name of Edward McGinty was for the benefit of John McGinty, it was misleading and erroneous in law.

And for the reasons stated, said defendant excepted to each of said several charges.

And said defendant also excepted to the refusal of the court to
60 give in substance instructions on each and every of the several points on which defendant had asked instructions as hereinbefore stated. And said defendant now tenders this his bill of exceptions and asks that the same may be signed and sealed as such, which is accordingly now done in term time, as witness my hand and seal this 30th day of May, 1879.

R. A. HILL, *Judge*. [L. S.]

And on the 8th day of June, A. D. 1879, the claimant, Edward McGinty, filed in the office of the clerk of the circuit court of the United States for the southern district of Mississippi his supersedeas and writ of error bond, which, with the approval of the judge of said court thereon, is in the words and figures following, to wit:

61 Know all men by these presents that we, Edward McGinty, principal, and John McGinty, George M. Kline, and John A. Kline, sureties, are held and firmly unto Charles M. Flannagan and George M. Flannagan, a mercantile copartnership, under the name of C. M. and G. M. Flannagan, in the sum of eight thousand dollars ($8,000), to be paid to the said C. M. and G. M. Flannagan, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 5th day of June, 1879.

Whereas the above-named Edward McGinty hath prosecuted a writ of error to the Supreme Court of the United States to reverse a
62 certain judgment rendered against him, which *in* the said C. M. & G. M. Flannagan recovered against him on a claimant's issue for the trial of the right of property in certain goods which has been seized under a writ of attachment issued at the suit of the said C. M. & G. M. Flannagan against one John J. Fitzpatrick, surviving partner of Fitzpatrick Bro's, in the circuit court of the United States for the southern district of Miss., at the May term, 1879, of said court:

Now, therefore, the condition of this obligation is such that if the above-named Edward McGinty shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force & effect.

EDWARD McGINTY. [L. S.]
JOHN McGINTY. [L. S.]
J. A. KLINE. [L. S.]
GEO. M. KLINE. [L. S.]

63 STATE OF MISS.,
Warren County:

Personally appeared before me, , a justice of the peace in and for said county, the within-named Jno. McGinty, George M. Kline, and John A. Kline, who, having been by me duly sworn, depose & say that they are worth more than the within bond above all liabilities.

J. A. KLINE.
GEO. M. KLINE.
JOHN McGINTY.

Sworn to and subscribed before me this June 5, 1879.

LAZ. LINDSAY, *J. P.*

The above bond is sufficient & approved.

LAZ. LINDSEY,
U. S. Com'r.

I approve the foregoing bond, with the sureties thereto, to operate as a supersedias of the judgment mentioned therein.
This June 7th, 1879.

R. A. HILL, *Judge.*

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Mississippi, greeting:

Because in the records and proceedings, and also in the rendition of the judgement of a plea which is in said circuit court before you, between Charles M. Flannagan and Geo. M. Flannagan, copartners doing business under the firm name and style of C. M. & G. M. Flannagan and Edward McGinty, wherein the latter was claimant of certain property which had been seized under a writ of attachment issued at the suit of said C. M. & G. M. Flannagan, against one John J. Fitzpatrick as surviving partner of Fitzpatrick Bro's, a manifest error hath happened, to the great damage of the said Edward McGinty, as by his complaint appears: We being willing that the error, if any, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that
65 then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause to be done further therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the said Supreme Court, and the seal of said circuit court thereto affixed, this 8th day of June, A. D. 1879.

[SEAL.] JAS. M. McKEE, *Clerk.*

(Indorsed:) Supreme Court of the U. S. 2635. Edward McGinty, claimant, vs. C. M. & G. M. Flannagan. Writ of error. Filed June 8th, 1879. Jas. M. McKee, clerk. Pittman & Pittman, att'ys for pl'ff in error.

66 UNITED STATES OF AMERICA, *ss:*

To C. M. & G. M. Flannagan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein Edward McGinty is plaintiff and you are defendant in error, to show cause, if any there be, why the judgement in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. R. Waite, Chief Justice of the said Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand eight hundred and seventy-nine.

R. A. HILL, *Judge, &c.*

67 Service of the within citation acknowledged this 18' June, 1879

CATCHINGS & INGERSOLL,
Att'ys for C. M. & G. M. Flanagan.

Attest:
D. M. PORTERFIELD.

D. M. Porterfield, being by me duly sworn, states that the above is the genuine signature of Thos. C. Catchings, one of the firm of Catchings & Ingersoll.

June 18, 1879.

[SEAL.]

LAZ. LINDSEY,
U. S. Com. U. S. Cir. Co't.

(Indorsed): Supreme Court of U. S. 2635. Edward McGinty, pl'ff in error, vs. C. M. & G. M. Flannagan. Citation. Filed June 8th, 1879, Jas. M. McKee, clerk. Service acknowledged and returned June 18th, 1879. J. M. McKee, cl'k. Pittman & Pittman, att'ys for pl'ff.

68 UNITED STATES OF AMERICA,
Southern District of Mississippi:

I, James M. McKee, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that the foregoing sixty-six pages do contain a true, full, and perfect transcript of the pleas, process, and proceedings had and done in a cause lately pending in the circuit court of the United States for the southern district of Mississippi, wherein C. M. & G. M. Flanagan were plaintiffs and Edward McGinty claimant, as fully and completely as the same now remains on file and of record in my office.

Given under my hand and the seal of said circuit court, hereto affixed at office in Jackson, in said district, this 28th day of July, A. D. 1879.

[SEAL.]

JAS. M. McKEE,
Clerk.

(Indorsement on cover:) No. 112. Edward McGinty, claimant, &c., pl'ff in error, vs. C. M. & G. M. Flannagan. S. Mississippi C. C. U. S Filed 20th October, 1879.

172——2

OFFICE SUPREME COURT U. S.
FILED
NOV 29 1892
JAMES H. McKENNEY, Clerk.

IN THE

United States Supreme Court.

No. 112.

EDWARD McGINTY,
Claimant, &c., PLAINTIFF IN ERROR,

vs.

CHARLES M. FLANNAGAN & GEO. M. FLANNAGAN,
Copartners doing business under the firm name and style of
C. M. & G. M. FLANNAGAN.

Argument of Alfred B. Pittman,

For Plaintiff in Error.

R. O. POLKINHORN, PRINTER.

IN THE

UNITED STATES SUPREME COURT.

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Copartners doing business under the firm name and style of
C. M. & G. M. FLANNAGAN.

Argument of Alfred B. Pittman,

For Plaintiff in Error.

Abstract of Transcript.

On February 10, 1879, Edward McGinty filed in the Circuit Court of the United States for the Southern District of Mississippi his affidavit as claimant of certain goods which had been seized by the marshal, under a writ of attachment against John J. Fitzpatrick, at the suit of defendants in error. (See Transcript, p. 1.)

On May 5th of same year, said McGinty filed his bond as claimant, and took the property *ib.*; and on the same day,

defendants in error, as plaintiffs in attachment, tendered issue, averring that the property was subject to the attachment; and claimant joined issue. (Transcript, p. 3.)

On May 30th, in said court, judgment was rendered against the claimant and his sureties. (Transcript, p. 3.)

Bill of Exceptions.

(See Transcript, p. 4.)

The plaintiff in attachment introduced in evidence the bill of sale from John J. Fitzpatrick, as surviving partner of Fitzpatrick Bros., to Ed. McGinty, dated December 20, 1878, which conveyed the stock in trade of the late firm, and sundry accounts (goods and accounts all properly scheduled), in consideration of $8200 in cash and the assumption of debts, amounting to $6974.16. The cash was paid, and the debts assumed were all paid at maturity.

The goods were sold at invoice price with ten per centum added, and a larger part of the accounts proved to be uncollectible than was supposed would be the case, and as since developed, the price paid by Edward McGinty was more than the real value of the assets.

The sale was made under the circumstances shown by the following extracts from the bill of exceptions:

> "The plaintiff also offered evidence tending to show the following facts preceding and attending the sale. That the late firm of Fitzpatrick Bros., of which J. J. Fitzpatrick is sole surviving partner, was dissolved by the death of J. C. Fitzpatrick on Sept. 6, 1878.
>
> "That the available and convertible assets were not sufficient to enable the surviving partner to meet liabilities as they matured, and have since proven insufficient, & that the late firm was insolvent.
>
> "That among the liabilities of the late firm were the claims of the plaintiffs for which they obtained judgment against the surviving partner in this attachment suit, which judgment was offered in evidence.

"That among said liabilities were debts due to the Mississippi Valley Bank amounting to about $6,000.00 & to John McGinty, who resides in New Orleans, La., one note of $5,200, and one of $2,500. That at the time of the death of J. C. Fitzpatrick John J. Fitzpatrick was detained at home by sickness of yellow fever in his family, having himself recovered from the same disease almost the latter part of Sept.

"That the said J. J. Fitzpatrick had an inventory taken on Oct. 1, of goods in stock; that for the purpose of replenishing stock about $200 worth of goods had been brought & put in the store.

"That the surviving partner continued to buy and sell, having bought between the death of his partner and the day of sale to the claimant over $12,000 worth of goods, many of them from plaintiffs.

"That on or about Dec. 3d, 1878, the said surviving partner being in great need of money to pay some debts of the late firm, borrowed $5,700 from the said John McGinty, with the statement that he urgently needed the money to pay some firm debts, and that he would so use it, and in a few days, as soon as he could realize from the assets, he would repay it. For this money he gave his note to John McGinty, payable one day after date, and applied the money to the payment of debts of the late firm.

"That on the 20th day Dec. he made the sale to Edward McGinty, and on the same day paid John McGinty the $5,700 borrowed on Dec. 3— & also $2,500— note of Fitzpatrick Bros., leaving unpaid the $5,200 note. There was evidence tending to show that the sale was made for the purpose of converting the assets into money to enable J. J. Fitzpatrick to make the payments to John McGinty, in preference to other creditors, and that Edward McGinty understood the object and purpose of the sale. The evidence claimed to have this tendency was evidence showing that Edward McGinty was a distant relative of John McGinty, who had lately come to the house of the latter from Michigan, in pursuance of an invitation extended to him in answer to a letter from Edward McGinty asking John McGinty to look out for employment for him.

"The fact that John McGinty had told him that the firm of Fitzpatrick Bros. owed him money, & that he, John McGinty, might have to take an interest in the house to secure payment; that John McGinty having declined to take an interest or to buy the stock and assets himself, on account of apprehension that it might not be legal because he was a creditor, suggested to Edward McGinty to buy, furnished him the money for that purpose, went with him to Vicksburg, and assisted in effecting the sale and received the money for the two notes, amounting to $8,200, at the hands of Edward McGinty, by whom the money had been sent by Fitzpatrick, the latter being then engaged. Edward McGinty took the money from Fitzpatrick, being the same which he had paid to him and carried it down to the hotel & paid it to John McGinty, & rec'd from him the notes, and gave them up to Fitzpatrick.

"John McGinty took the note of Ed. McGinty for the money so loaned, and this note remains unpaid. In addition to this, said John McGinty testified that he had not concealed from Edward McGinty his object in procuring the purchase, & thinks he must have understood it, tho' he did not talk much with him about it and did not state to him any of the particulars. Edward McGinty had arrived from Michigan on the 11th of Dec., 1878.

"EDWARD MCGINTY, called by plaintiff, said he understood, from what John McGinty had told him, & from circumstances, that the object of the sale on the part of J. J. Fitzpatrick was to get the means of paying John McGinty, but knew nothing of the particulars of the debt."

There was evidence tending to show that there had been no misapplication of the assets of the partnership, unless the payments made by the sale constituted a misapplication; and there was evidence tending to show that the debts of the co-partnership which had been paid equalled the net assets converted or disposed of by the surviving partner.

The bill of exceptions contains copies of the bill of sale, schedules annexed, some advertisements, letters of John J Fitzpatrick admitted against claimant's objection, memorandum of proposition made by Fitzpatrick to defendant in error, admitted against objection, and the memorandum of agreement between McGinty and Fitzpatrick, by which McGinty had right to the good-will and to use of name of Fitzpatrick in the firm, and his services as clerk for $2,500 per annum.

> "It was in evidence that the debts assumed by Edward McGinty as being payable to C. M. & G. M. Flanagan, described on the schedule as acceptances, refer to the plaintiff's, and were paid by Edward McGinty at respective maturities. There was evidence tending to show that the sale to Edward McGinty and its terms were known to plaintiffs before their attachments were sued out."

This constituted all the evidence as stated in the bill itself.

His Honor gave the following instructions:

Instructions Given.

1st. If the jury believe from the evidence that J. J. Fitzpatrick sold the goods of the late firm of Fitzpatrick and Bros. and applied the proceeds to the payment of some of the creditors of said firm to the exclusion of others, he had a right to do so, provided it was not done with the purpose of delaying and preventing those not paid for collecting that which was due them.

2. It was the duty of J. J. Fitzpatrick, as such surviving partner, to sell and convert into money the goods and property belonging to said firm, and to collect the debts due the firm, and first apply the same to the payment of debts due by the firm, and not to mingle the same with his own goods, so that they could not be identified, he being by law created a trustee for this purpose; but if he mingled them with other goods, so

that they could not be identified, he thereby rendered his own goods liable for the debts of the firm, or those originally owned by the firm; and if he applied the proceeds of the sale of such goods, either originally owned by the firm or those afterwards purchased and mixed up with them so that they could not be identified, to the payment of his private debts, such disposition operated as a fraud upon the rights of the creditors of the firm of which he was surviving partner and as to him rendered the sale void.

The death of J. C. Fitzpatrick terminated the partnership of Fitzpatrick & Bros. The continuance of the business after that time, though in the name of Fitzpatrick & Bros., was his own business. If, after the death of J. C. Fitzpatrick, J. J. Fitzpatrick borrowed money and applied it to the payment of the debts of Fitzpatrick & Bros. it was paying a debt for which was bound, and he could not withdraw any portion of the firm assets until after the partnership debts are paid.

3. If the evidence satisfies you that the sale of goods held by J. J. Fitzpatrick as aforesaid was made for the purpose of the misapplication of the proceeds, as above stated, and McGinty, the claimant, purchased in good faith, without the knowledge of such wrongful purpose, he nevertheless acquired a good title to the goods, and your verdict should be for him.

4. If you believe from the evidence that at the time of the purchase McGinty, the purchaser, knew or had reasonable cause to believe that the goods so purchased belonged to the late firm of Fitzpatrick & Bros., and that the sale was made to pay a debt due by J. J. Fitzpatrick alone, he became chargable with the fraud of Fitzpatrick, his bargainer, and your verdict should be for the plaintiff.

5. If you believe from the evidence that Fitzpatrick, in making the sale, intended to become a partner with McGinty, and derive a benefit thereby, and by so doing to place the stock of merchandise sold beyond the reach of the creditors of Fitzpatrick & Bros., it was a fraud upon the rights of the creditors of said firm; and if the proof further shows that McGinty, the purchaser, had

a knowledge of such purpose, or had reasonable cause to so believe he would be effected by the fraud, and your verdict should be for the plaintiff; but if no such understanding was had at the time, but an arrangement for the partnership was afterwards, and the contract was otherwise valid, then such arrangement would be valid; or if there is not sufficient evidence that McGinty, the claimant, knew, or had reasonable cause to believe, that such arrangement was made with the wrongful purpose aforesaid, although it existed in the mind of Fitzpatrick, he was not affected thereby, and your verdict should be for the claimant.

6. Fraud must be proved, but is seldom established by direct proof, but like any other fact may be established by circumstantial evidence. The burden of proof is upon the plaintiff to establish by proof to your reasonable satisfaction the fraud charged. You are the sole judges of the weight to be given to the evidence, and will, first considering all the circumstances as shown by the evidence, and first ascertain whether the sale was fraudulent under the rules of law stated, and if you find it is not so established you will return your verdict for the plaintiff; but if you find the sale fraudulent so far as made upon the part of Fitzpatrick, your next enquiry will be to ascertain whether or not, under the rules stated, McGinty knew, or had reasonable cause to believe, that the sale was fraudulent; if it is found that he had no such knowledge, or reasonable cause to believe the sale fraudulent, your verdict will still be for the complainant; but if you find that he did know, or had reasonable cause to believe, the sale on the part of Fitzpatrick, under the rules stated, your verdict will be for the plaintiff.

7. If the proof shows that the plaintiffs, with a full knowledge of all the facts, approved the sale, they will be estopped from setting up the fraud, and if the proof shows that with such knowledge they received a part of the property conveyed or its proceeds will be evidence for such approval.

8th. If the jury believe that it was understood between the parties when the contract was made that the conveyance was made Edward McGinty to pre-

vent the same from liability to the creditors of Fitzpatrick, and that J. J. Fitzpatrick was to receive a benefit from the transaction in the form of a salary or otherwise, the contract was fraudulent and void.

9. If the proof shows that Edward McGinty was not, in fact, the purchaser of the goods, but that John McGinty was the real party, and that name of Edward McGinty was for the benefit of J. J. Fitzpatrick or John McGinty, the contract was fraudulent and void.

Claimant had asked the following instructions:

Instructions Requested.

1st. If the jury believe that Edward McGinty, the claimant, purchased the goods levied on from J. J. Fitzpatrick, as surviving partner of Fitzpatrick & Bros., in good faith, they must find for the claimant.

2d. And the purchase would not be fraudulent merely because the sale was made to convert the assets into money for the purpose of paying John McGinty a debt for money loaned by him to the surviving partner to be used and which was used in paying partnership debts, although said Fitzpatrick, as such surviving partner, was insolvent at the time, and although Edward McGinty had full knowledge of all the facts and the purposes of the parties.

3. If the jury believe that J. J. Fitzpatrick, as surviving partner, bought goods on a credit to replenish the stock which was on hand at the death of his partner, and continued to buy and sell as surviving partner, and as such surviving partner borrowed money and used the same in payment of partnership debts, and continued and carried on the business of the late firm in good faith, and then sold the stock in trade and other assets for a full, fair value, and applied the proceeds to the payment of certain preferred creditors, some of whom were creditors of the late partnership, and others of whom were creditors for goods sold since the death of the late partner, such sale will be valid, although the purchaser knew the facts and understood that the sale was made for the purpose of making such application of the money.

4. If J. J. Fitzpatrick, as surviving partner, continued and carried on the business of the late firm of Fitzpatrick & Bros., adding to the stock, mingling the new with the old goods, creating debts for the goods so purchased, as surviving partner, in good faith, the new creditors may be paid out of the assets of the entire business, and any sale or assignment of the goods, though consisting of the old and new commingled, will not be avoided, because the proceeds were paid with the knowledge of the purchaser to creditors, old & new, indiscriminately, although some of the partnership creditors may remain unpaid and unprovided for.

5. If a surviving partner carries on the business of the late copartnership without authority, and the goods purchased by him since the dissolution of the partnership are claimed as partnership property, and the surviving partner is held to account for the entire business as partnership business, then all debts contracted by him in good faith for the benefit of such business are to be treated as partnership debts, or as of equal dignity & equity with partnership debts.

6th. The jury are instructed that if the plaintiffs accepted from Edward McGinty the payment or payments assumed by him as part of the price for his purchase, and knew at the time of accepting said payments the consideration upon which it was made, then plaintiffs are estopped, and the jury must find for the claimant.

7th. If the jury find that Edward McGinty has made any payment to the plaintiffs in pursuance of his assumption as part consideration of the purchase of the goods levied on, and if plaintiffs, having received said payment without being at the time apprised of the consideration thereof, have nevertheless retained it since they have acquired such knowledge without having offered to return the money so paid to them, they will be estopped, and the jury must find for the claimant.

8th. If the jury believe the evidence, they must find for the claimant.

9th. If the jury believe that the price paid by Edward McGinty was full value of the property at the time, and the purchase-money was intended by both Edward McGinty and Fitzpatrick to be applied to the

payment of John McGinty's debt, and of the other debts assumed paid by Edward McGinty, there can be no inference that such sale was intended to defraud the creditors whose debts were not provided for by sale, although such sale necessarily resulted in giving the creditors whose debts were thus provided for a preference, to the exclusion of creditors not so provided for.

10th. Although the jury may believe from the evidence that Fitzpatrick was influenced in making this sale by a well founded expectation of future employment from the purchaser, this cannot render the sale void if it was made for a full and fair price.

11th. Even if the jury should infer that John McGinty had an understanding with Fitzpatrick that the latter would be employed after a sale made for the purpose of paying John McGinty's debts, and that John McGinty, in pursuance of that understanding, requested Edward McGinty to employ Fitzpatrick, they cannot hold the sale void on this account if it was made for a full and fair price.

Exceptions to the instructions given were properly reserved, and also to refusal to charge substantially as requested.

Plaintiff in error assigns for error the several rulings of the court in admitting testimony against his objection, and in giving the instructions, and in refusing those asked, and such other exceptions taken as are hereinafter set out and discussed.

Argument.

It is not believed that any evidence tending to make this purchase void was introduced, and if we are right in this, the case ought to have been withdrawn from the jury by giving the instruction to find for the claimant as it was requested to do.

The bill of exceptions which states all the evidence or the substance of all of it, shows affirmatively, with no con-

tradicting evidence, and none of a different tendency, that the goods and claims were sold for more than their value, and the proceeds applied to the payment of partnership debts. There is nothing in the case of which fraud may be predicated against McGinty either as to *intent* or *act*.

Why then should the jury be permitted to take the case at all? It would seem they ought to have been instructed, as asked, to find for claimant.

The instructions which were given seem to be so much involved that intelligible criticism is difficult.

The first instruction puts the proposition that a *preference* is right and allowable. although made to the exclusion of other creditors, *provided* that result was not *intended*. The proposition is not intelligible. The law presumes that no man is so stupid as not to know that when he appropriates all his assets to one or more creditors to the exclusion of others, he necessarily thereby delays and prevents the others from collecting. Their delay and defeat follows as a necessary *incident*. If we could find some *insolvent* who would do this—make a preference and yet not intend it, what merit would his sale possess? His ignorance of necessary results would not help other creditors. This unintelligible instruction is discussed in our argument filed in the case of *Fitzpatrick* vs. *Flannagan*, pending in this court, No. 111. We cite pp. of that argument, and also the case of *Eldridge* vs. *Philipson*, 58 Miss., holding that there are no such things as unfair preferences in Mississippi, unless they are *fraudulent*, covering some advantage to the grantor, or otherwise collusive.

The 2d instruction is an erroneous proposition of law. It should have been modified and explained as requested in the third request. For further discussion of this instruction, and of claimant's request for instruction touching the same matter, we cite the argument filed in case No. 111—above referred to, on pp. .

The 3d and 4th instructions connect McGinty with the supposed frauds spoken of in the 1st and 2d. If the jury should find he was aware of the existence of the facts therein referred to, it gives the injurious effect to the other instructions.

The 4th instruction is further objectionable, because, as stated in the exception, its tendency was misleading, and impressed the jury with the idea that to pay debts, contracted after dissolution of partnership, for replenishment of the stock, out of the proceeds of the very goods so bought, was fraudulent; and that a sale to McGinty, with a purpose to apply any part of the proceeds in that way, would be void, if known to him.

The 5th instruction is objectionable, because it tells the jury that the sale will be void on account of Fitzpatrick's expectations, without McGinty's promise, agreement, or understanding with him that his "intentions" or "purposes" shall be fulfilled.

The 6th instruction refers to the rules laid down in previous ones to determine whether the sale was fraudulent; but as no intelligible rule had any where been stated, and as they were told to ascertain whether McGinty knew of the fraudulent character of the sale, without designating what knowledge on McGinty's part, and knowledge of what facts, would justify them in concluding that he knew the sale to be fraudulent—that instruction could have only produced more confusion.

The 7th instruction ought to have been, substantially, as requested in claimant's 6th request. It is defective, and qualifies the proposition by saying that an acceptance of McGinty's payment, with full knowledge of all the facts, would be evidence of their approval.

It may be well to call attention here to the failure of the

court to give, substantially, the 7th request of claimant on the same subject. It was proper and appropriate, and its omission was error.

The 8th instruction was objectionable, because it was wholly abstract and joined two propositions inseparably together which have no relation—the effect being to produce on the mind of the jury that each purpose involved the other.

The 9th instruction was erroneous, because, if Edward McGinty's purchase had been wholly for the benefit and use of John McGinty, it would not have rendered it fraudulent. Neither the creditors nor the court have any concern in that matter.

It is respectfully submitted that the several instructions requested, properly state the law applicable to the facts, and that they should have been substantially given in some form. If not all of them, then some of them. They were asked separately and severally.

It was error to permit the introduction of the letters and memoranda of Fitzpatrick. It was not shown that McGinty had any knowledge or connection therewith.

It was error also to admit against objection the memorandum of proposition for compromise.

In conclusion, this case presents a forcible illustration of the necessity of requiring of the presiding judge, plain, explicit and appropriate instructions. It is a grievous error against a defendant charged with fraud, especially in a case in which losses by insolvency are seen to be inevitable, to have the minds of the jurors confused by a lengthy charge abounding with denunciations against frauds in a general way, and yet giving no *definite* and *explicit* direction to inquire, and putting no limits to conjecture. The general tendency and spirit of the instructions, as a whole, was to

invite the jury to convict the defendant McGinty of fraud on the merest conjectures of his knowledge of some illy defined fraudulent purpose of his vendor.

A close and careful re-examination of all the instructions will leave the mind in doubt and confusion as to what *facts* the jury were to determine.

It is evident that these instructions were given under the influence of at least two errors of law, which were in the judicial mind, and which were multiplied and modified in such way as to produce great confusion of thought. One was an idea that every preference is fraudulent, if intended as a preference. The definition of "PREFERENCE," in Bouvier's Law Dictionary, is as follows:

> "The paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claim, to the exclusion of the rest."

If the grantor is *not* insolvent, and the conveyance is not to the "*exclusion of the rest*," it is not a preference at all. I confess that the idea sought to be given by the instructions, whatever it may be, has seemed always unthinkable to my mind.

Another error which had influence in giving direction, or, if not direction, at least tendency, to the instructions, seems to be that a surviving partner must keep the goods sacredly separate from all others. If they require to be replenished, so as to meet the demands of customers (without which they cannot be sold at retail), he must not get new goods and mingle with the old. If he pays cash for new goods out of separate funds of his own, and puts them "in stock" immediately, like goods stolen and mingled with his own by a thief, he loses all right to deal with those new goods, except as partnership property. If he sells them, he dare not buy more with their proceeds; for, having been "mingled," they must be applied to partnership debts only.

The new dealing is all his *own*, so far as *paying* for it, and all his dead partners, or their creditors, so far as *owning* and enjoying the proceeds go. If he buys more goods on a credit, and *mingles*, he is worse off than the detected thief, because, while he must pay for them, he can't own them afterwards. Whatever goes into the stock must stay there. If commercial bills mature, he must pay them in shoes and hair-pins and whetstones, if the partnership has no cash on hand, for it will be fraudulent if he should temporarily use money or exchange of his own, or any one else's, and replace it, when in funds, out of partnership effects.

This idea runs through the instructions, and is sufficient to surround every transaction with suspicions of fraud. It matters not that every thing has been done in *good faith*, with *good intentions* and *good results;* the fact that the partnership property has been preserved in saleable form and sold to advantage, furnishes no excuse; the fact that partnership creditors have had all the advantages, and received more than all the full value of the assets and property, will avail nothing, if any has been *mingled* so that the very price paid for each and every article be not applied to debts of the late partnership. There seems to be nothing in such an idea to commend it to approbation. It is impracticable. It would result injuriously to all the parties interested. It would segregate all the capital and stock in trade of an active business, and, in an hour, render it all unavailable and useless and difficult to deal with. All sorts of agents and trustees and administrators, who have no title or beneficial interest in property, have more power, more discretion, and are less hampered and tramelled than the surviving partner, under this rule, who *owns* the goods vested with the full legal title and *jus disponendi* unincumbered, save by so modest a thing as a *quasi* lien, of creditors, said to be *derivative*, and dependent on the *assent* o the surviving partner.

ALFRED B. PITTMAN,
For Plaintiff in Error.

16661

OFFICE SUPREME COURT U. S.
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JAMES H. McKENNEY, Clerk.

Supreme Court of the U. S.

EDWARD McGINTY, Claimant,
vs.
CHARLES M. FLANNAGAN and GEO. M. FLANNAGAN, co-partners, doing business under the firm name and style of C. M. & G. M. FLANNAGAN.
} Case No. 112.

Brief for Defendant in Error.

JEFF. CHANDLER,
Attorney for Defendant in Error.

Supreme Court of the U. S.

EDWARD MCGINTY, Claimant, *vs.* CHARLES M. FLANNAGAN and GEO. M. FLANNAGAN, co-partners, doing business under the firm name and style of C. M. & G. M. FLANNAGAN.	Case No. 112.

On the 6th day of September the firm of Fitzpatrick & Bro. which had therefore existed, became dissolved by the death of J. C. Fitzpatrick, one of the members thereof, leaving J. J. Fitzpatrick the sole surviving partner.

At that date the said firm was insolvent.

Among the debts owing by the said firm at its dissolution were the following:

Note to Mississippi Valley Bank .	$6,000
" John McGinty . . .	5,200
" " " . . .	2,500

On the 3d of December J. J. Fitzpatrick borrowed of John McGinty $5,700, with the avowed purpose of paying the firm note held by the Mississippi Valley Bank of $6,000, and for said amount so borrowed by said J. J. Fitzpatrick he executed his note to John McGinty. Said surviving partner continued to carry on the business of the late firm from the date of the dissolution to December 20 following; without the assent of the heirs of the deceased partner; the surviving partner contracted debts therefor in his own name.

On the 20th day of December the claimant pretends to have purchased the merchandise and personal property belonging to the firm of Fizpatrick & Brother at the date of dissolution for $8,200 cash, and the assumption of $6,974.16 of debts of the firm. The testimony shows that claimant had no money of his own with which to pay for said property; that at that time the old firm's indebtedness to John McGinty, witnessed by the two notes aforesaid of $5,200 and of $2,500, remained unpaid, and the surviving partner owed said McGinty $5,700 borrowed as aforesaid. Edward McGinty, claimant, received from John McGinty $8,200 in cash, handed it to J. J. Fitzpatrick in exchange for the merchandise and property aforesaid. Fitzpatrick at once returned said money to claimant, who carried it at once to John McGinty then in waiting at a hotel a short distance from the store of Fitzpatrick. Said John McGinty received again from claimant the identical money delivered to claimant a few moments previous, and in exchange therefor delivered to claimant two notes, one the said note of $5,700 executed December 3 by J. J. Fitzpatrick, and one for $2,500 executed by the late firm of Fitzpatrick & Bro, which notes were immediately carried and delivered to J. J. Fitzpatrick by claimant, when the transaction of the so-called sale was deemed complete.

The Court below treated these facts as susceptable of the interpretation that the figures cut in the transaction by claimant was simply to furnish a means in which the transfer of the property could be made, and to transport the money and notes back and forward between the real parties to the sale; that the real consideration of the sale was the payment of the private note of J. J. Fitzpatrick of $5,700 and the late note of $2,500.

On the same day of the alleged sale notice of co-partnership between J. J. Fitzpatrick and Edward McGinty, claimant, was published, which co-partnership held themselves out thenceforward to the world as the owners of the property and business of the late firm of Fitzpatrick & Brother.

It will be seen that the result of all this change of ownership of the property in controversey was the extinguishment of but $2,500 of firm indebtedness.

There can be no controversey concerning the proposition that a creditor of a partner cannot receive in payment of the individual and private debt of said partner, partnership property or funds.

Story on partnership sec. 133 and note.

The firm of Fitzpatrick & Brother was dissolved on September 7, by the death of J. C. Fitzpatrick. On December 3 following, the note of $5,700 was given to John McGinty. This note was certainly the private note of J. J. Fitzpatrick. A partner after dissolution of the firm cannot execute a note in the name of the firm in renewal of a partnership note.

Moore vs. Lockman, 52 Missouri Rep., 323.

The Record (page 20) shows that there was evidence tending to show that Edward McGinty, John McGinty and J. J. Fitzpatrick understood that the money paid by the said Edward was to be paid by Fitzpatrick to John McGinty on the debts due to the latter.

One partner cannot pay his private debts with goods of the firm or with its funds.

Flannagan vs. Alexander, 50 Missouri Rep., 50;
Ackley vs. Stocklin, 56 Missouri Rep., 561;
Hilliker vs. Francisco, 65 Missouri Rep., 604.

When one partner purchases the interest of the other partner, he cannot mortgage what was the partnership property to secure his private debts to the exclusion of the partnership creditors.

66 Missouri Rep., 554–8.

It is per se fraudulent to pay a private debt of one of the firm with partnership assets.

Story on part. sec. 131;
Johnson vs. Hersey, 70 Maine Rep., 74;
National vs. Underhill, 21 Hun., 181–3;
Sedgwick vs. Lewis, 70 Pa. St., 217.

If the private creditor of one partner cannot receive firm property to discharge the individual debt of said partner, *directly*, he cannot be a party to a scheme to accomplish the same result *indirectly* without perpetrating a fraud upon the creditors of the co-partnership. Story on Part., Sec. 131. (Sixth Ed.)

It is immaterial for the purposes of this case, whether the transfer of the property in controversy, was made to Edward or John McGinty, the result of the sale was, as it actually transpired, to appropriate the property of the firm or its immediate proceeds, to the payment of an individual debt of one of the partners, and thereby to deprive the creditors of the firm of its value.

Under the facts of this case however, John and not Edward McGinty (claimant) must be the real party in interest in the transaction, inasmuch as the proof is that claimant had not a dollar to pay for the goods transferred or to put into the new partnership. He simply stood in the transaction for John McGinty. (See page 7 of record.)

It is insisted that the Court erred in defining an "unfair preference" and therefore the judgment of the lower court should be reversed.

The instruction of the Court below is not erroneous as construed in the light of the first exposition of the State Statute by the State Court, made since this case was decided below in the case of Eldridge et al. vs. Philipson, 58 Miss. 270. The elements of an "unfair preference" as defined in this case below, are the elements of fraud as defined in the case cited in 58 Miss. They are insolvency of debtor, who knows that he is unable to pay all his debts and who disposes of his means to one or more of his creditors to the exclusion of others, with a *design* that those unpaid shall remain so. What may be evidence of such *design* is not set out in the instruction to the jury defining unfair preference. Plaintiff in error contends that the *design* or *intent* can have nothing to do with the matter. This is manifestly a mistake. Suppose an insolvent convey to one creditor property of a value three or four times greater than the amount of the debt to be paid. Though the disproportion between the value of the property conveyed, and the amount of the debt would be immaterial as between the debtor and creditor, could not an excluded creditor complain of such a preference, as unfair and also as fraudulent, and would not such disposition of his means on the part of the debtor show a *design* that the excluded creditor shall remain unpaid. Defendants in error insist that error is not shown by plaintiff in error, in the charge complained of; but on the contrary, the charge is confirmed, though in different language in the case in 58 Miss. The actual value of the goods said to have been sold to McGinty was a matter in controversy (see record page 8) and it

was proper to charge the jury with relation to that fact. No inventory is shown to have been taken later than Oct. 1st (See plaintiff's brief, page 3.) It is stated in the record it is true, that the goods were sold at original cost with 10 per centum added, but what goods is not shown, whether those inventoried October 1, (the amount of that inventory even is not shown) or the goods as replenished at the time of sale. At all events the subject of the value of the goods was in controversy, and inasmuch as the whole stock was transferred in bulk it was proper to charge the jury upon the *design* of the transfer.

On the same day of the alleged sale, J. J. Fitspatrick gave notice of a co-partnership with Edward McGinty in the goods in dispute. (See page 8 record.)

Afterwards when the property was attached on February 15, he disclaimed ownership (see page 8 of record.)

It became therefore a question whether or not J. J. Fitzpatrick was benefitted by his own alleged sale made on the 20th day of December. The evidence shows that the Court below was dealing with a case, where after a dissolution of a firm by the death of one of its members, the survivor, without consulting the heirs of the deceased partner, took control of the property, good will of the co-partnership, sold it out, and on the same day published notice of co-partnership with another in the ownership of the property and business sold, and that the business was to be carried on at the old stand in the future (see page 8 Record).

If there were errors committed in submitting some of the propositions to the jury (which is denied) it is insisted that the testimony as set forth on pages 6, 7

and 8 of record, shows that the real purpose and consideration of the alleged sale of the 20th of December was to pay the private note of J. J. Fitzpatrick to John McGinty for $5,700, and this fact being beyond dispute the alleged sale was void and the other matters though correctly submitted, become unimportant, though otherwise sufficient to avoid the said sale.

The suggestion that those who sold goods after the dissolution of the firm to J. J. Fitzpatrick ought to be paid out of the general stock is not pertinent to this issue, insomuch as said creditors are making no such claim; and further, the contract of sale on page 4 purports to convey *only* the property of the old firm of Fitzpatrick & Brother.

This bill of sale estimates on its face the goods sold to be worth $6,633.46, and transfers accounts of $10,222.06. Total, $16,856 06. There was paid $8,200 cash, and debts assumed to amount of $6,974.16. Total, $15,174.16, the difference being $1,681.90, besides the goodwill of the old firm, which the parties by their notice of the new co-partnership seem to value. The testimony as to the invitation by Fitzpatrick to meet Flannagan at his, Fitzpatrick's house is admissible, because McGinty attended the meeting, thus showing that he was acting with Fitzpatrick and approving all he did. The proposition of settlement testified to by Flannagan was admissable, because handed to him by McGinty himself.

The letter of December 20th was admissible because it was written by Fitzpatrick in part to retain your continuance of business with Fitzpatrick & McGinty, he making this request as *partner* and being fortified in this by the advertisement that he and McGinty were partners, whereby the latter became estopped from denying

anything he might say or do in the capacity of partner. By this advertisement, McGinty made all statements of Fitzpatrick in the character of partner, admissible, even when made after the sale. it is admissible on another ground. Where the grantor testifies in support of the deed his declarations even when made after the sale are admissible, for the purpose of contradicting him, and thus depriving the grantee of the benefit of his testimony, by showing that he has made different statements. In this case he swore that he was not a partner. In the letter he said he was a partner. It was competent therefore to contradict him by introducing it. If he had not testified, the rule would be different. This principle is recognized in Venable vs. Bank U. S., 2 Peters, 107.

This brief is submitted in connection with brief of defendants in error in case No. 111, which is a kindred case.

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